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No. 82-141

In the Supreme Court of the United States

OCTOBER TERM, 1982

JACOBO MARTI & SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that exercise of its jurisdiction over petitioner would not infringe the free exercise of religion by Amish farmers who supply petitioner with milk for its cheesemaking operation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-18a) is reported at 676 F. 2d 975. The decision and order of the National Labor Relations Board (Pet. App. 21a-55a) are reported at 255 NLRB 1428.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1982. The petition for a writ of certiorari was filed on July 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Farmers' Cheese Cooperative Association ("the Association") is a group of farmers, most of whom are Amish, who have joined together to market their milk (Pet.

App. 9a-13a). In 1955, the Association entered into a contract with Jacobo Marti, which provided that Marti would manage a cheesemaking plant for the Association and would perform certain other tasks which the Amish members of the Association could not undertake (*id.* at 31a).[1] Sometime thereafter Marti purchased the plant and formed petitioner. Petitioner owns the land and cheesemaking plant and has assumed Marti's obligations under the cheesemaker agreement with the Association (*id.* at 4a). Pursuant to that agreement, petitioner processes the Association's raw milk into cheese and cheese by-products; the Association retains ownership of the final product. None of petitioner's stockholders or officers is Amish, nor does petitioner own any stock in the Association (*id.* at 32a).

In 1978 a union campaign began at petitioner's plant, led by employee Walter Holler (Pet. App. 37a). Personnel manager Ronald Miller learned of Holler's activity and told him that the company could not afford a union. Miller described the existing benefits offered by petitioner and said that if the employees became less wasteful and more productive, petitioner might increase wages. Miller spoke about forming an employee committee to promote improved work habits, working conditions, and pay. Miller also stated that if a union came in, petitioner's Amish employees[2] could no longer work at the plant, that the Association would no longer supply petitioner with milk, and that the petitioner would therefore have to close (Pet. App. 6a, 38a, 47a).

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[1]Pennsylvania enacted regulations in 1955 requiring refrigeration of milk, which would have required the Amish (contrary to their religious beliefs) to use electricity (Pet. App. 3a-4a).

[2]Twenty of petitioner's 89 employees are Amish (Pet. App. 4a). During a union organizational campaign in 1973, the Association informed petitioner that it would terminate its agreement should petitioner's employees join a union (Pet. App. 5a).

2. The Board found that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by promising to increase wages and improve benefits if the employees did not support the union, and by threatening to close the plant if the employees chose a union to represent them (Pet. App. 21a-22a).

In so finding, the Board rejected petitioner's contentions that the First Amendment exempted the Association from the Board's jurisdiction and that petitioner was exempt because of its close ties to the Association. The Board found that the Association was not a religious organization, but rather a business corporation which was "not church sanctioned or 'church operated' " (Pet. App. 33a). The Board further found that, even assuming the Association was exempt from its jurisdiction, the exemption would not extend to petitioner, who "has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization" (*ibid.*). The Board also rejected petitioner's contention that its assumption of jurisdiction would not effectuate the policies of the Act because petitioner would be forced to cease operating. The Board found that claim to be factually unsupported, concluding that loss of petitioner's Amish customers would at worst cause "disruption" to petitioner's business (Pet. App. 34a-35a).

3. The court of appeals agreed with the Board that the free exercise clause of the First Amendment did not preclude assertion of Board jurisdiction over petitioner. The court noted that petitioner's First Amendment argument was based on the contention that (Pet. App. 7a-8a):

> because of their religion, the Amish would be prohibited from dealing with its cheese processing plant if it should become unionized. The lack of other facilities in

> the area would totally deprive the Amish of a market, and termination of the arrangement would be almost as disastrous for Marti.

However, the court found that these factual contentions were not borne out by the record (Pet. App. 8a, 11a-12a).

Specifically, the court found that the record did not establish that the Association would not supply petitioner with milk if the latter's employees were unionized (Pet. App. 10a). The court added that "the record does not establish whether the Amish prohibition against joining a union extends to ban dealings with an organized company as well" (*ibid.*). As the court pointed out (*id.* at 11a n.3):

> Without questioning the sincerity of the Amish beliefs, it is unclear why a sales arrangement would offend the religious tenets of the Amish if Marti were to unionize when it was stipulated that "Jacobo Marti was hired to manage the plant and to do certain other acts prohibited by the Amish faith which the Association could not itself undertake."

The court noted that, even if petitioner's unionization would make the Amish unwilling to continue their present arrangement, "[t]here is no evidence before us to suggest that an alternative arrangement would not avoid the asserted religious objections" (*id.* at 10a-11a).

The court also agreed with the Board that petitioner is "an independent organization that controls its own employee relationships" (*id.* at 15a). The court noted that the Association could cancel petitioner's contract for any or no reason and concluded that petitioner's "operation is no more symbiotic with the Association than is any other

commercial enterprise which depends upon a single supplier by virtue of a contract that may be cancelled on notice for any or no reason" (Pet. App. 15a-16a).[3]

ARGUMENT

Petitioner contends that if, as a result of the Board's exercise of jurisdiction over it, its employees unionized, the Association would be compelled to cease doing business with it because of the religious beliefs of the Association's Amish members. Petitioner further contends that in that case the Association would have no market for its milk and petitioner would have no supplier for its cheesemaking operation. The court of appeals found it unnecessary to determine whether these factual assertions (if well-founded) would establish a violation of the Amish farmers' rights under the Free Exercise Clause of the First Amendment,[4] because the record did not support them. The only question actually presented here is whether that assessment of the record is correct.[5] That fact-bound issue does not warrant review by this Court.

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[3]The court also rejected petitioner's claim, made on behalf of his 20 Amish employees, that they could no longer be employed if a union came into the plant. "Although their religion prohibits the Amish from belonging to a union, there is nothing here to show that they may not work side-by-side with employees who do join." (Pet. App. 12a).

[4]The court assumed arguendo that petitioner has standing to raise the First Amendment issue even though petitioner has not asserted infringement of any religious belief or practice of its own. See Pet. App. 8a n.2. The petition for a writ of certiorari presents no question in this Court other than the First Amendment issue.

[5]In *United States* v. *Lee*, No. 80-767 (Feb. 23, 1982), the Court held that the preliminary inquiry in determining whether an enterprise must be exempted from regulation on First Amendment grounds is whether regulation actually interferes with the free exercise of religion. Once such interference is demonstrated, "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an

In any event, the court of appeals correctly concluded that on this record no burden on the free exercise rights of Amish members of the Association was shown. The record does not demonstrate that the Association, because of the religious precepts of its Amish members,[6] could not deal with petitioner if it unionized. Nor does it show that the Amish would have no market for their product other than petitioner. Finally, the record does not sustain the position that loss of the Association's milk supply would be fatal to petitioner's business.

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overriding governmental interest." Slip op. 5. See also *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Petitioner urges (Pet. 16) that the court of appeals improperly put the burden on it to show that the religious interest allegedly impaired here overcame the governmental interest. However, it is petitioner's initial burden of showing an interference with the free exercise of religion that the court found was not met.

[6]Petitioner relies largely (Pet. 10) on the stipulation that in 1973 the Association asserted that it would break its contract with petitioner if the latter's employees unionized. As the court noted (Pet. App. 9a-10a), it is not shown whether the Association was still of that view. In any event, as the court further noted, petitioner conceded a difference between the contractual arrangement which it had with the Association and the willingness of the Association to supply it milk under a different arrangement, and "admitted that he did not know whether the Association would still supply him with their milk in [the] event [of unionization]."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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